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Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1995

JOSEPH B. SHUMATE, JR.,

Petitioner,

v.

NCNB CORPORATION AND
SUBSIDIARIES
now NationsBank.

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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105 pp

QUESTIONS PRESENTED IN

Record #95-2048

Federal Rule of Civil Procedure 69(a), execution, states that the procedure on execution in proceedings supplementary to and in aid of a judgment, and in proceedings on and in aid of execution shall be in accordance with the practice and procedure of the state in which the District Court is held, existing at the time the remedy is sought except for any statute by the United States government to the extent that it is applicable.

Virginia Code §8.01-511 et. seq. governs garnishments. §8.01-512.4 states, no garnishment shall be issued or served unless notice of exemption and claim for exemption form are attached.

Virginia Code §8.01-512.5 states

that a judgment debtor shall have the right to a hearing on his claim exemption from garnishment not later that seven (7) business days from the date that the claim is filed with the court.

On Virginia garnishment form item #20 is retirement benefits pursuant to Virginia Code §34-34.

§34-34 states that a retirement plans means a plan, account or arrangement that is intended to satisfy 26 USC §401, 403(a), 403(b), 408, 409 or 457 and includes pension plans, individual retirement accounts, as well as employee stockholder plans. §34-34 exempts from garnishment an individual's annual retirement benefit up to $17,500 annually.

The doctrine of res judicata requires that the parties must be the same or their privies; the subject matter

must the same; and while generally the precise point must be ruled, yet where the parties are the same or in privity, the judgment is an absolute bar not only of what was decided but what might have been decided. However, if an issue is brought before the court in proper form and the court refuses to hear the issue, the court later ruling res judicata and it not being addressed by the appellate court would deny the party due process of law.

The district court holding that ERISA preempts state law regarding pension funds without exception and the appeals court affirming that the pension funds at issue was not entitled to the protection under the anti-alienation provision afforded by ERISA (29 USC §1056(d)(1)) does not address the issue that Federal Rule of Civil Procedure

69(a) defers to state law to collect judgments. The 4th Circuit's unpublished opinion in this case is in conflict with previous published opinions of the 4th Circuit, other courts of appeal as well as the Supreme Court denying the petitioner equal protection of the law as well as due process of law.

The questions presented are:

1. Does FRCP 69(a) require the district court in proceedings supplementary to and in aid of judgments and in proceedings on and in aid of executions to be in accordance with the practice and procedure of the state in which the district court is held?

2. Does res judicata apply when the court refuses to hear a motion for exemption pursuant to state garnishment exemptions?

3. Does 29 USC §1001 et. seq. (ERISA) preempt state law regarding pension funds without exception?

QUESTIONS PRESENTED IN

Record #95-2824

The funds for the petitioner's pension were transferred from an ERISA approved pension fund trust to the district court's registry pending determination as to whether the pension funds belonged to the petitioner's bankruptcy estate or the petitioner in 1987 so the pension plan in trust could be terminated by district court order.

It was ultimately determined that the pension may be excluded from the bankruptcy estate in Patterson v. Shumate, 112 S.Ct. 2242 (1992). The district court and the U.S. court of appeals held that the pension funds held in the court's registry were protected by ERISA (29 USC §1056(d)(1). When the district court ordered all the pension funds held in the registry paid to the

petitioner in 1993, the clerk of the district court withheld #3,123.04 as a registry fee assessment.

The 4th Circuit held that the district court properly determined that the administrative expenses which Shumate seeks to have returned to him, were lawfully deducted without reference to statute or case authority.

The question presented is:

1. Does the ERISA anti-alienation provision of 29 USC §1056(d)(1) withstand 28 USC §1914 (registry fees) when the district court orders ERISA protected funds deposited in the court's registry so that a pension plan may be terminated?

LIST OF PARTIES

Record #95-2048:

The parties are the petitioner, Joseph B. Shumate, Jr., and the respondent is NCNB Corporation and subsidiaries, now known as NationsBank. In the district court proceedings, Roy V. Creasy, trustee in bankruptcy of Coleman Furniture Corp. and trustee and plan administrator of the Coleman Furniture Corp. pension plan, and John R. Patterson, trustee in bankruptcy for the petitioner, were named parties. None of these parties has an interest in the outcome of these proceedings and none participated in the case in the court of appeals, and therefore, none are named as parties herein.

Record #95-2824:

The parties are the petitioner,

Joseph B. Shumate, Jr., and the respondent is the United States District Court for the Western District of Virginia, the clerk of the court of the Western District of Virginia did not participate in the district court proceedings or in the court of appeals proceedings, therefore, he is not named as a party herein.

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Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

The petitioner, Joseph B. Shumate, Jr., respectfully prays that a writ of certiorari issued to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in the above entitled proceedings on April 3, 1996.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fourth Circuit is reprinted in the Appendix hereto p. 3a, infra. Denial of rehearing at p. 1a, infra. Order consolidating #95-2048 and #95-2824 at p. 57a, infra.

The bench opinion of the U. S. District Court for the Western District of Virginia in #95-2048 is reprinted in the Appendix hereto p. 7a, infra. Order reprinted p. 6a, infra.

The decision and opinion of the U. S. District Court for the Western District of Virginia in Record #95-2824 entered September 8, 1995 is reprinted in the Appendix hereto p. 14a, infra.

JURISDICTION

The jurisdiction of this court to review the judgment of the 4th Circuit Court of Appeals is invoked under 28 U.S.C. §1254(1)

STATUTES INVOLVED

1. Virginia Code §8.01-511, reprinted in the appendix hereto, p. 17a, infra;

2. Virginia Code §8.01-512.4, reprinted in the appendix hereto, p. 23a, infra;

3. Virginia Code §8.01-512.5, reprinted in the appendix hereto, p. 27a, infra;

4. Virginia Code §34-17, reprinted in the appendix hereto, p. 28a, infra;

5. Virginia Code §34-34, reprinted in the appendix hereto, p. 29a, infra;

6. Virginia Code §8.01-505, reprinted in the appendix hereto, p. 35a, infra; and

7. 29 USC §1056(d)(1) reprinted in the

appendix hereto, p. 55a, infra.

RULES INVOLVED

1. Federal Rules of Civil Procedure 69(a), reprinted in the appendix hereto, p. 16a, infra;

STATEMENT OF THE CASE

This is a continuation of Civil Action #83-279 and #86-433 in the Western District of Virginia, being heard in the 4th Circuit in Record #88-2174 where the appeals court reversed the district court holding that Shumate's pension belonged to his bankruptcy estate of which a writ of certiorari was granted in Patterson v. Shumate, 112 S.Ct. 2242 (1992) which affirmed the appeals court ruling that an individual's ERISA approved pension plan may be excluded from an individual's bankruptcy estate. Petition for

rehearing was denied.

The funds to provide for Shumate's pension from the Coleman Furniture ERISA/IRS approved pension plan was placed in escrow in the district court's registry in 1987 to allow the Coleman bankruptcy trustee and also pension plan administrator to close out the Coleman pension plan.

NCNB acquired a judgment against Shumate in March 1992 as the district court denied Shumate standing to sue for damages NCNB did to his assets and denied him counterclaim and setoff, which is still being contested.

After the Supreme Court affirmed the 4th Circuit in 1992 that a pension plan may be excluded from a bankruptcy estate, NCNB filed a writ of execution and liened on the funds held in the district court's registry and moved for the turnover of

the funds to NCNB. The district court denied the request of which NCNB appealed in Record #92-2474. (App. p. 50a, infra)

The 4th circuit affirmed the district court ruling that Shumate's funds in the court's registry were still protected by ERISA and were exempt from creditor process on May 18, 1993. On June 10, 1993, the district court quashed NCNB's garnishment against Shumate's pension funds in the court's registry and ordered the funds paid to Shumate. Shumate took the funds from the court's registry bank on June 11, 1993. The clerk of the court withheld $3,123.04 as a registry fee. On June 14, 1993, Shumate established a trust account at Premier Bank in Pulaski, Virginia to hold funds to purchase an annuity to provide for his future pension benefits, placing $59,000 in the account, distributing

$235,000 being pension owed him plus interest from June 1983 to June 1, 1993 and held $77,000 in cashier's checks pending the determination of the amount needed to purchase an annuity in the amount of $1,458.33 a month for his life time being the maximum amount that would be exempt from garnishment pursuant to VA Code §34-34.

On June 15, 1993, NCNB liened on the account and filed a garnishment freezing the $59,000. After an evidentiary hearing on June 25, 1993, the district court held on June 30, 1993, that the funds were no longer protected by ERISA when they left the court's registry.

The court also stayed the order pending an appeal. The 4th Circuit affirmed the district court in Record #93-2092 on December 29, 1994.

On June 21, 1993, Shumate filed with

the district court his motion for exemption from garnishment of his pension funds pursuant to VA Code §8.01-512.4 and §34-34. At the evidentiary hearing on June 25, 1993 the court refused to hear the exemption request. (App. p. 39a, infra) Both parties argued the Virginia Garnishment Exemption Law for Pensions in their brief to the 4th Circuit in #93-2092 of which the appeals court did not address.

After the 4th Circuit upheld the district court in December 1994 and denial of rehearing, NCNB filed a writ of execution and garnishment proceedings for the $59,000+ held in Premier Bank. Shumate refiled his exemption motion in the district court which was heard on May 10, 1995. On May 11, 1995, the district court denied Shumate's motion for exemption based on its bench opinion of

May 10, 1995, being

(a) "subject matter was res judicata because the thing had been adjudicated"

(b) ERISA preempts state law regarding pension funds

(c) "Virginia Code §34-34 does not apply to distributed funds" when in fact the funds in question had not been distributed as they had been segregated in a trust account pending rollover into a life time annuity. (App. p. 7a, infra)

The district court's order of May 11, 1995, took under advisement the funds taken out of the pension for administrative costs. On September 11, 1995, the district court held it was proper for the clerk of the district court to withhold $3,000+ of ERISA protected funds contrary to 29 USC

§1056(d)(1). On October 16, 1995, the 4th Circuit consolidated #95-2048 and #95-2824 for further appellant action. (App. p. 57a, infra)

REASONS FOR GRANTING THE WRIT

IN #95-2048

I. The 4th Circuit's decision that it had already determined that the pension funds at issue are not entitled to protection under the anti-alienation provisions afforded by ERISA (29 USC §1056(d)(1)(1988)) after the actual distribution referring to NationsBank v. Shumate in #93-2092 (4 CCA 1229 1994) (unpublished) does not address the issue that the district court violated FRCP 69(a)(execution).

This court in Mackey v. Lanier Collections, 486 U.S. 825, 834 (1983) holds that FRCP 69(a) defers to state law

to provide methods for collecting judgments and that state law methods for collecting money judgments must remain undisturbed. This has been the position of the 4th Circuit in its recent opinion in U.S. v. Harkins Builders Inc., 45 f.3d 830, 833 (4 CCA 1995) holding that a lien of execution may be enforced in Virginia through a garnishment proceeding pursuant to VA Code §8.01-511, (App. p.17a, infra) and the Virginia Practice and Procedures is borrowed by the federal rules for purpose of enforcing judgments through writ of execution when garnishment was obtained in Virginia.

Virginia Code §511 et. seq. governs garnishments. §8.01-512.4 (App. p.23a, infra) states no garnishment shall be issued or served unless notice of exemption and claim for exemption forms are attached. Virginia Garnishment

Exemption Form item 20 covers retirement benefits pursuant to VA Code §34-34. (App. p.29a, infra) Section 8.01-512.5 (App. p.27a, infra) states the debtor has the right to a hearing on his claim of exemption within seven business days from date the exemption claimed is filed with the court. Section 8.01-514 states that a garnishment summons is returnable 90 days after issue. NCNB filed a lien on the funds held in trust at Premier Bank and garnishment on June 15, 1993. Shumate filed a motion to quash on the basis of ERISA and claim of exemption based on VA Code §34-34 to be heard on June 25, 1993. The district court refused to hear Shumate's motion for exemption on June 25, 1993, in violation of Virginia garnishment statutes (see June 25, 1993 hearing transcript, page 16, App. p,39a, infra). After the 4th

Circuit held in #93-0292 that funds were no longer protected by ERISA, NCNB filed a new writ of execution and garnishment return date being May 15, 1995, as a lien on intangibles ceases one year from the return date of execution, pursuant to VA Code §8.01-505. Shumate again moved for a hearing for exemption from garnishment pursuant to VA Code §8.01-511 et. seq. in the district court (App. p.44a, infra) The hearing was set for May 10, 1995. The district court contrary to FRCP 69(a) erroneously held that ERISA governs and supersedes Virginia's garnishment law.

The lower courts are not following FRCP 69(a) as interpreted by this court and previous published rulings by the 4th Circuit has denied the petitioner due process of law as well as equal protection of the law.

II. The doctrine of res judicata does not apply when the lower court refuses to hear an issue. The district court held at page 22, line 20 in the May 10, 1995 hearing (App. p.8a, infra) that res judicata applies because "the thing had been adjudicated" is erroneous as the court refused to hear the motion originally filed to he heard at the June 25, 1993 hearing. (App. p.39a, infra) This matter could not have been decided because the district court refused to hear the issue of garnishment exemption at the June 25, 1993 as well as the May 10, 1995 hearing. No issue is barred by res judicata if the court(s) refused to hear the issue because a person's due process rights to be heard before judgment has been denied. Fuentes v. Shevin, 407 U.S. 67, 81 (1972).

The original garnishment expired on

September 15, 1993 pursuant to VA Code §8.01-514. The lien on intangibles ceases after one year pursuant to VA Code §8.01-505. The district court erred by its call of res judicata because (1) the court refused to hear the garnishment exemption issue on June 25, 1995; (2) the original lien ceased on or about September 15, 1994, and the lower courts refused to hear the exemption issue on the second lien on May 10, 1995, both times denying Shumate his due process rights. The fact that both parties addressed the exemption issue in their briefs to the 4th Circuit of which the 4th Circuit did not address, the redetermination of the issue is warranted if there is reason to doubt equality, extensiveness, or fairness of procedures followed in prior litigation. Kremer v. Chemical Construction Corp., 456 U.S.

461, 481 note 22 (1982).

III. 29 USC §1001 et. seq. does not preempt state laws regarding pension funds without exemptions. The 4th Circuit has not addressed the district court's ruling that ERISA preempts state laws regarding pension funds without exception. VA Code §34-34 states that a retirement plans means a plan, account or arrangement that satisfies the Internal Revenue Code 26 USC §401, 403(a), 403(b), 408 and 409 or 457.

These funds came from a pension fund for the exclusive benefit of its employees. The trust also can not be assigned or alienated pursuant to 401. 403(a) and 403(b) require that these funds be taxable and paid as an annuity and that any portion of the moneys earmarked for pension payments may be

rolled over.

§408 refers to an individual retirement account. Since lower courts had previously ruled that Shumate's funds are no longer protected by ERISA, VA Code §34-34 protects these funds as an individual retirement account and is also protected from garnishment and §408 also allows partial rollovers.

§409 refers to employee stockholder plans which would also be protected from garnishment pursuant to §34-34.

The lower court's statement at page 22, line 24 of the hearing transcript of May 25, 1995 (App. p.8a, infra) that ERISA law preempts state laws regarding pension funds is over broad and does not address the issue of state garnishment exemptions and is contrary to the Supreme Court's decisions in Mackey, supra, which held that a state law that relates to an

ERISA plan if it singles out the plan it has a connection with a reference to such plan. The Mackey court emphasizes that the key is the singling out that preempts state laws.

VA Code §34-34 definition of a retirement plan does not mention ERISA. This court in Shaw v. Delta Air Lines, 463 U.S. 85 at 100 note 21 (1983) held that "A neutral state law of general application with a tangential impact on an ERISA approved pension plan does not relate to ERISA and is not preempted." The 9th Circuit in Retirement Fund Trust of Plumbing v. Franchise Trust, 909 f.2d 1266, 1280-81 (9 CCA 1990) follows Mackey, supra holding that to "relate to" ERISA a state law also must purport to regulate it. VA Code §34-34 in no way attempts to regulate ERISA.

In Guidry v. Sheet Metal Workers

National Pension Fund, 39 f.3d 1078 (10 CCA 1994) held that ERISA did not preempt Colorado statutes which exempts from garnishment 75% of disposable earnings including compensation denominated as pension or retirement benefits from garnishment with respect to pension benefits paid to and received by plan beneficiary as the statute did not specifically refer to ERISA benefits or plans, affect calculation of plan benefits or impact administration of a plan or relationship among plan beneficiaries and paid to him and held by him in a bank account not co-mingled with other funds and that Guidry qualified for the Colorado exemption.

The Guidry court en banc relied on this court's ruling in District of Columbia v. Greater Washington Board of Trade, 113 S.Ct. 580, 583 (1992) which

held that a state law may "relate to" a benefit plan "even if the law is not specifically designed to affect such plans, or the effect is only indirect".

In the matter of Volpe, 943 f.2d 1451, 1452 (5 CCA 1991) held that Texas exemptions for various retirement accounts was not preempted by ERISA.

The 4th Circuit did not address the issue that the district court had erred in ruling that ERISA preempts state law for retirement plans without exceptions. The 4th Circuit in upholding the district court's order in essence voids Virginia garnishment statutes and exemptions and denies Shumate due process of law and equal protection of the law.

The 4th Circuit also has not addressed the issue that the district court has in ruling that ERISA preempts state garnishment exemption laws violates

the outcome determination principle mandated by Erie v. Tompkins, 304 U.S. 64, 74-75 (1938).

In diversity jurisdiction cases such as this, the results in federal courts should be substantially the same as those in state court litigation arising out of the same transaction, similar transactions or occurrences.

The 4th Circuit has allowed the district court to violate FRCP 69(a) on garnishment proceedings by ruling contrary to state law.

The 4th Circuit has allowed the district court to rule contrary to the holding of this court in Mackey, supra, that FRCP 69(a) defers to state law to provide methods for collecting judgments and that state law methods for collecting money judgments must remain undisturbed.

Under VA Code §34-17 property may be

set aside as exempt after it is subject to the lien of the judgment and after a garnishment proceeding has been instituted. Wilson v. VA National Bank, 196 S.E.2d 920 (VA 1973).

This court has consistently held that in diversity cases it must decide the case in accordance with the substantial law of the forum state as interpreted by that state's highest court. Prior to this decision the 4th Circuit has consistently held that in diversity cases it must decide the case in accordance with the substantive law of the forum state as interpreted by the highest court of that state. Watkins v. M & M Tank Lines, 694 f.2d 301, 311 (4 CCA 1982).

The 4th Circuit in upholding the district court has deviated from the outcome determination principle as

mandated by this court in Erie v. Tompkins, supra.

REASONS FOR GRANTING THE WRIT

IN #95-2824

The 4th Circuit has erred in holding that the District Court properly determined that the administrative expenses which Shumate seeks to have returned to him were lawfully deducted when those funds were specifically provided to fund Shumate's pension and were not subject to any alienation including administrative expenses.

The funds placed in the district court's registry were to be used to pay Shumate's pension and pursuant to 29 USC §1056(d)(1) which states that "each pension plan shall provide that benefits provided under the plan may not be assigned or alienated." If the district

court's registry had administrative expenses while holding these non-alienable funds the registry must look to other assets in the pension plan to pay the administrative expenses and not from the funds earmarked for Shumate's pension.

The 4th Circuit in #92-2474 (App. p. 53a, infra) determined that the funds while in the district court's registry were unreachable by creditors until after they were actually distributed. The district court's registry arbitrarily and in direct violation of the district court's order of June 10, 1993, directing that the clerk of the court release the funds held in the registry of the court being the interest of Joseph B. Shumate, Jr. in the pension fund of Coleman Furniture Corp. as well as 29 USC §1056(d)(1) took $3,123.04 contrary to

by this court and previous published opinions of the 4th Circuit.

This court has vigorously enforced ERISA's prohibition on the assignment or alienation of pension benefits, declining to recognize any implied exceptions to the broad statutory bar. Guidry v. Sheet Metal Workers Pension Fund, 493 U.S. 365 (1990).

The 4th Circuit in Smith v. Mirman, 749 f.2d 181 (4 CCA 1984) held that ERISA's anti-alienation provision continues to govern administration of a plan's assets throughout the process of winding up the distribution. Shumate's portion of the Coleman Pension Plan while placed in the court's registry had not been distributed and was protected from all alienation including administrative expenses.

The 4th Circuit's ruling is in

conflict with its ruling in Phillips v. Bebber, 914 f.2d 31 (4 CCA 1991) held that strict procedures set forth in Title IV of ERISA is a prerequisite to termination of employee retirement plans.

29 USC §1341(b)(3)(i) states that before the plan administrator can terminate a pension plan he must purchase irrevocable commitments from an insurer to provide all benefits under the plan (ii) or otherwise fully provide all benefit liabilities under the plan.

In Bebber ibid at page 34 the 4th Circuit held that strict compliance with the statute is the sole means by which a pension plan subject to the provisions of ERISA may be terminated.

Thus, the district court's registry must look to other assets of the Coleman Pension Plan to collect administrative expenses as pursuant to ERISA the pension

funds placed in the registry for Shumate's pension are not subject to alienation for any purpose. The 4th Circuit's ruling that the district court properly determined that the administrative expenses which Shumate seeks to have returned to him were lawfully deducted denies Shumate due process of law as well as equal protection of the law.

CONCLUSION

The crux of the issue in this case is that the U.S. Court of Appeals for the 4th Circuit has not addressed the issues in this appeal.

The 4th Circuit's brief announcement of the disposition of the case not accompanied by a written opinion in its unpublished per curiam opinion does not address the issues and plainly states that its unpublished opinions are not

binding precedent in the 4th Circuit.

The law of the case should be the same whether it be a published opinion or an unpublished per curiam opinion.

The decision should be the same based on the same facts whether it be prepared by a pro se litigant, one man law firm, or a hundred man law firm.

Equal justice for all can not be had if an unpublished per curiam opinion is allowed to dodge the issue or rule contrary to published opinion by the same court on the same issue.

The 4th Circuit's opinion in this case that it had already determined that the pension funds at issue in this appeal are not entitled to protection under the anti-alienation provision afforded by ERISA (29 USC §1056(d)(1)(1988) after actual distribution has no bearing on FRCP 69(a).

This court, the 4th Circuit and most of the other appeals courts hold that FRCP 69(a) defers to state law to provide methods for collecting judgments and that state law methods for collecting money judgments must remain undisturbed.

The 4th Circuit did not address the district court's ruling res judicata in the May 10, 1995 hearing even though the district court refused to hear the issues in the June 23, 1993 hearing.

The 4th Circuit's recent published opinion on res judicata requires three elements for res judicata, (1) a final judgment on the merits in a prior suit; (2) an identity of the cause of action in both the earlier and the later suit; (3) an identity of parties or their privies in the two suits. Meekins v. United Transportation Union, 946 f.2d 1054, 1057 (4 CCA 1991). The district court refused

to hear the issue in 1993 and there wes no final judgment on the merits of a garnishment exemption in 1993 or 1995.

This being a garnishment issue, the published decisions of the 4th Circuit is that Virginia's Practice and Procedure is borrowed by FRCP 69(a). See U.S. of A. v. Harkins Builders, 45 f.3d 830, 831 (4 CCA 1995).

The 4th Circuit in refusing to address the ERISA preemption issue as to garnishments denies the petitioner equal protection of the laws as well as due process of law.

The 4th Circuit in #95-2824 holding that "the district court properly determined that the administrative expenses which Shumate seeks to have returned to him were lawfully deducted" is in direct conflict with the 4th Circuit's opinion in #92-2474 decided May

18, 1993, unpublished opinion (App. p53a, infra) which held that Shumate's pension funds were absolutely protected by ERISA while in the district court's registry.

The clerk of the U.S. District Court took the $3,123.04 from Shumate's ERISA protected funds while they were lodged in the court's registry in direct violation of 29 USC §1056(d)(1).

In Record #95-2048 the Circuit Court of Appeals for the 4th Circuit by refusing to address the issues has sanctioned the lower courts departure from the law of the case denying Shumate due process of law and equal protection of the law. The petitioner prays that this court exercise its power of supervision to rectify this travesty of justice.

In Record #95-2824 the 4th Circuit in deciding that the district court had

properly determined Shumate's ERISA protected funds while lodged in the district court's registry were subject to administrative expenses and lawfully deducted is in direct conflict with 29 USC §1056(d)(1) as interpreted by this court in Mackey v. Lanier Collections Agency, 486 U.S. 825 (1988); Guidry v. Sheet Metal Workers Pension Fund, 493 U.S. 365 (1990), and Patterson v. Shumate, 112 S.Ct. 2242 (1992), and has denied Shumate due process of law as well as equal protection of the law.

The petitioner prays that a writ of certiorari be granted to correct the travesty of justice enumerated above.

Respectfully submitted,

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APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
May 14, 1996

No. 95-2048
CA-83-279-R
CA-86-272-R
CA-86-433-R
CA-86-432-R

NCNB FINANCIAL SERVICES, INCORPORATED
Plaintiff - Appellee
and
ROY V. CREASY, Trustee
Plaintiff

v.

JOSEPH B. SHUMATE, JR.
Defendant - Appellant
and
COLEMAN FURNITURE CORPORATION PENSION PLAN; JOHN R. PATTERSON, Trustee
Defendants

No. 95-2824
CA-86-272-R

In Re: JOSEPH B. SHUMATE, JR.
Appellant
and
ROY V. CREASY, Trustee
Plaintiff

v.

COLEMAN FURNITURE CORPORATION PENSION PLAN; JOHN R. PATTERSON, Trustee
Defendants

On Petition for Rehearing with
Suggestion for Rehearing In Banc

The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,

/s/ Bert M. Montague
CLERK

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NCNB FINANCIAL SERVICES,
INCORPORATED,
Plaintiff - Appellee,

and

ROY V. CREASY, Trustee,
Plaintiff,

v. No. 95-2048

JOSEPH B. SHUMATE, JR.,
Defendant - Appellant,

and

COLEMAN FURNITURE CORPORATION PENSION
PLAN; JOHN R. PATTERSON, Trustee,
Defendants.

IN RE: JOSEPH B. SHUMATE, JR.,
Appellant,

and

ROY V. CREASY, Trustee,
Plaintiff,

v. No. 95-2824

COLEMAN FURNITURE CORPORATION PENSION
PLAN; JOHN R. PATTERSON, Trustee,
Defendants.

Appeals from the U.S. District Court
for the Western District of VA,
at Roanoke.
Glen M. Williams, Senior District Judge
(CA-83-279-R, CA-86-272-R,
CA-86-432-R, CA-86-433-R)

Submitted: March 21, 1996

Decided: April 3, 1996

Before NIEMEYER and MICHAEL, Circuit Judges, and BUTZNER,* Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

COUNSEL

Joseph B. Shumate, Jr., Appellant Pro Se. Stephen McQuiston Hodges, PENN, STUART, ESKRIDGE & JONES, Abingdon, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION

PER CURIAM:

Joseph B. Shumate, Jr. appeals from the district court's orders (1) denying

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*Senior Judge Butzner did not participate in consideration of this case. The opinion is filed by a quorum of the panel pursuant to 28 USC §46)d).

his motion to stay NCNB's garnishment summons and writ of execution (No. 95-2048) and (2) denying his motion for return of $3,123.04, which was deducted for administrative expenses, pursuant to 28 USCA §1914(b) (West 1994), from his funds held in the district court's registry (No. 95-2824).

This court has already determined that the pension funds at issue in this appeal are not entitled to protection under the anti-alienation provisions afforded by ERISA (29 USC §1056(d)(1) (1988)), after an actual distribution. Nationsbank v. Shumate, No. 93-2092 (4th Cir. Dec. 29, 1994) (unpublished). Accordingly, Shumate's claims are barred by res judicata. Further, the district court properly determined that the administrative expenses which Shumate seeks to have returned to him were lawfully deducted. Accordingly, we affirm. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VA
ROANOKE DIVISION

NCNB NATIONAL BANK OF
NORTH CAROLINA, now known as
NATIONSBANK,
Plaintiff

v.

C.A. #s 83-0279-R and 86-0433-R

JOSEPH B. SHUMATE, JR.,
Defendant

For reasons stated in a bench opinion after hearing argument of counsel, the motion of Joseph B. Shumate, Jr. to quash the garnishment funds held in Premier Bank is hereby DENIED. The court also denies the motion to stay the Order of this court pending appeal.

Shumate has also filed a motion to require the Clerk of this court to pay over funds held in the court's Registry which have been deducted for administrative costs. The court takes this motion under advisement.

The Clerk is directed to send certified copies of this Order to counsel of record.

ENTERED: This 10th day of May, 1995.

/s/ Glen M. Williams
Senior US District Judge

IN THE US DISTRICT COURT
FOR THE WESTERN DISTRICT OF VA
Roanoke Division

NCNB FINANCIAL SERVICES, INC.,
Plaintiff,

v. C.A. 83-279-R

JOSEPH B. SHUMATE, JR.,
Defendant.

May 10, 1995
3:05 p.m.
Abingdon, VA

TRANSCRIPT OF HEARING
BEFORE THE HONORABLE GLEN M. WILLIAMS
SENIOR U.S. DISTRICT JUDGE

Appearances:
MARK FRYE, Esquire
Penn Stuart
P.O. Box 2288
Abingdon, VA 24212-2288
and JAMES F. DOUTHAT, Esquire
Woods, Rogers & Hazlegrove
P.O. Box 14125
Roanoke, VA 24038-4125
Counsel for the Plaintiff.

MR. JOSEPH B. SHUMATE, JR.
P.O. Box 2092
Pulaski, VA 24301
Pro Se.

Proceedings recorded by Stenography, transcript produced by computer.

the Court, and the Court never addressed the, made the decision and stayed the order pending the decision of the Fourth Circuit.

By staying the order I would say that then after the order was upheld it would be time to hear the exemption, which is now.

Thank you, sire.

THE COURT: Well, I'm going to overrule the motion to quash and enter an order to that effect on three grounds.

First of all, the subject matter of this suit is res judicata up until this point unless the Supreme Court reverses. The, in other words, the subject matter of this suite is this matter exempt from garnishment, and the Court has held it's not, and the Fourth Circuit has held it's not, and that's the subject matter of this suit.

Now, you may have different grounds in a lawsuit, or raise certain grounds, or certain matters may not be raised, but the principle of res judicata applies because the thing has been adjudicated. I could rest my case on that point.

But secondly, as I've pointed out here, I am of the opinion that ERISA, under Fourth Circuit law, preempts state law regarding pension funds, and I

feel that the Fourth Circuit felt the same way, and that's the reason they addressed this matter from an ERISA viewpoint.

The fact that ERISA no longer provided protection doesn't mean that ERISA law hasn't preempted. And in other words, you look to ERISA to see whether or not it's exempt. And ERISA does not hold it to be exempt once it's passed into the hands of the pensioner. And that's what I've held.

The third ground of, if it comes down to it, is it's my holding that 34-34 does not apply to distributed funds. And therefore, even if you looked at state law it wouldn't change the effect of this.

So, I'm overruling the motion and I'll enter an order to that effect.

Now, I also had before me a motion by Mr. Shumate to stay this matter until another case that's on appeal before me has been heard. I expect to have an opinion out in a few days in that case, but I see no reason to stay this order, and so I overrule that motion.

I believe in doing that I have ruled on all the matters that have been raised in this case. So, we'll adjourn court for this case.

MR. SHUMATE: Your Honor, we have another motion, Your Honor.

THE COURT: Well, what is it?

MR. SHUMATE: First, I would ask that you, in your ruling, define what you base, distributed funds means. I have pointed out that these funds have not come to me, I have not cashed those funds, and I do not have them in my pocket. And this is a critical area, in my opinion.

THE COURT: Well, you have taken possession of these funds and have spent, I've forgotten the exact amount, approximately $250,000, I believe, well over $200,000, and if that's not taking possession of the money and taking control of it, I don't know what is.

MR. SHUMATE: I wish to point out I did not take these funds as one check. I took them in various checks, and I did not, I did not actually have control of them until I cashed the, and the funds in the trust account for future pensions was never cashed; it was transferred from one bank to another for, to be placed in an annuity.

THE COURT: Well, I'll overrule that motion.

MR. SHUMATE: You will not address that

issue?

THE COURT: I said I overrule it. Is that another motion?

MR. SHUMATE: Yes, sir. In June, 1993 when the Court ordered the clerk of this court to turn over the pension funds to me, the court paid over all except $3,123.04.

I'm here to petition the Court for an order to pay over the balance of these funds, as these funds were protected by ERISA under 29 USC Section 1056, and 26 USC Section 401, and as long as they're protected by that they are, shall not be assigned either in law or in equity, alienated or subject to attachment, garnishment, levy or other legal process.

These funds have been held by the Court, and I ask for an order to turn these funds over to me forthwith.

THE COURT: Well, I don't suppose that Mr. Douthat -- neither of you gentlemen represent the clerk?

MR. DOUTHAT: No, sir.

MR. FRYE: I do not, Your Honor.

THE COURT: Has the clerk been served with this notice?

MR. SHUMATE: Yes, sir, both notices.

THE COURT: Sir?

MR. SHUMATE: Both notices. The notice for last week and the notice for this week. And my letter to the clerk was very specific, that this was, would be of interest to him.

MR. FRYE: I've not seen the letter to the clerk, but the two notices that were provided did not raise the issue of administrative charges that were imposed by the Court unless Mr. Shumate has filed something else.

MR. SHUMATE: There are no -- I mean, these funds under ERISA are protected, and there can be no administrative charges on these funds. I mean, if ERISA protects them while they're in the court's registry, which this Court and the Fourth Circuit has ruled --

THE COURT: Well, I'll take that motion under advisement.

MR. SHUMATE: One thing more, Your Honor. I would ask you to stay your order pending appeal.

THE COURT: I'll overrule the motion. I think this matter is so clearcut, it's been adjudicated, you've had your day in court on it, and I think the law is clear, and I'm not going to stay

it.

That will conclude this hearing. Come forward with the next case.

(Proceedings concluded at 3:50 p.m.)

CERTIFICATE

I certify that the foregoing is an accurate transcript from the record of proceedings in the above-entitled matter.

_____ _____

Date Bridget A. Dickert

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VA
ROANOKE

ROY V. CREASY, TRUSTEE,
Plaintiff

v. C.A. No. 86-0272

COLEMAN FURNITURE CORP.
PENSION PLAN, ORDER
Defendant

On December 11, 1987, the Clerk of Court receipted $250,000.00 into the registry to be held in an interest bearing account until this court could rule on the merits of this case and thereby determine whom the money belonged to. In accordance with the order of investment, the money was held until an order of disbursement issued on June 10, 1993, paying the funds to Joseph B. Shumate.

On June 11, 1993, Mr. Shumate appeared in person in the Clerk's office. A certified copy of the order of disbursement was then hand carried to the bank of deposit by the clerk accompanied by Mr. Shumate. By direction of the court's order the funds were disbursed: $3,123.04 payable to the Clerk of Court as registry fee assessment, and $363,975.23 to Mr. Shumate. At the express request of Mr. Shumate, the disbursement to him was in the form of three checks, one for $100,000.00, one for $235,000.00 and one in the amount of

$27,975.23. Upon return to the office, the Clerk receipted the $3,123.04 into the United States Treasury, account 510100. On April 21, 1995, Mr. Shumate filed petition to compel the Clerk to return the registry fee assessment to him stating that the Court's order of June 10, 1993, was violated by not disbursing all the money to him.

The clerk assessed the registry fee against this account by authority and requirement of Title 28, United States Code, Section 1914. In accordance with this statute, the Judicial Conference of the United States approved a general policy statement and guidelines for the district court regarding collection and deposit of the registry fee. This court entered a Standing Order Adopting Guidelines for Deposit of Registry Funds on May 19, 1993, which further directs the clerk to assess the fee in accordance with the statute and with the policy adopted by the Judicial Conference.

It is the Court's opinion that the clerk assessed the "first 45 days' income" properly against this account, that the assessment was then deposited with the United States Treasury in accordance with Title 28, United States Code, Section 2041, and therefore Mr. Shumate is not entitled to recover said fee.

ENTERED the 8th day of Sept. 1995.

/s/ Glen M. Williams
Senior Judge, US Dist Court

RULE 69. EXECUTION

Test of Rule 69

(a) **In General.** Process to enforce a judgment for the payment of money shall be a writ of execution, unless the court directs otherwise. The procedure on execution, in proceedings supplementary to and in aid of a judgment, and in proceedings on and in aid of execution shall be in accordance with the practice and procedure of the state in which the district court is held, existing at the time the remedy is sought, except that any statute of the United States governs to the extent that it is applicable. In aid of the judgment or execution, the judgment creditor or his successor in interest when that interest appears of record, may obtain discovery from any person, including the judgment debtor, in the manner provided in these rules or in the manner provided by the practice of the state in which the district court is held.

§8.01-511. Institution of garnishment proceedings. -- On a suggestion by the judgment creditor that, by reason of the lien of his writ of fieri facias, there is a liability on any person other than the judgment debtor or that there is in the hands of some person in his capacity as personal representative of some decedent a sum of money to which a judgment debtor is or may be entitled as creditor or distributee of such decedent, upon which sum when determined such writ of fieri facias is a lien, a summons in the form prescribed by §8.01-512.3 may (i) be sued out of the clerk's office of the court from which an execution on the judgment is issued so long as the judgment shall remain enforceable as provided in §8.01-251, (ii) be sued out of the clerk's office to which an execution issued thereon has been returned as provided in §16.1-99 against such a person or (iii) be sued out of the clerk's office from which an execution issued as provided in §16.1-278.18. The summons and the notice and claim for exemption form required pursuant to §8.01-512.4 shall be served on the garnishee, and shall be served on the judgment debtor promptly after service on the garnishee. Service on the judgment debtor and the garnishee shall be made pursuant to subdivision 1 or 2 of §8.01-296. When making an application for garnishment, the judgment creditor shall set forth on the suggestion for summons in garnishment the last known address of the judgment debtor, and shall furnish the clerk with an envelope, with

first-class postage attached, addressed to such address, whereupon a copy of the summons and the notice and claim for exemptions form required under §8.01-512.4 shall be inserted into such envelope by the clerk and sent to the sheriff with the process to be served. The sheriff, promptly after service on the garnishee, shall mail such envelope by first-class mail to the judgment debtor at his last known address. If the serving officer is unable to serve the judgment debtor pursuant to subdivision 1 of §8.01-296, such mailing shall satisfy the mailing requirements of subdivision 2 b of §8.01-296. The sheriff shall note on his return the date of such mailing which, with the notation "copy mailed to judgment debtor" shall be sufficient proof of the mailing of such envelope with the required copy of the summons and the notice and claim for exemption form inserted by the clerk with no examination of such contents being required by the sheriff nor separate certification by the clerk that the appropriate documents have been so inserted. If the serving officer is unable to serve the judgment debtor pursuant to subdivision 1 or 2 of §8.01-296, such mailing shall constitute service of process on the judgment debtor. The judgment creditor shall furnish the social security number of the judgment debtor to the clerk, except as hereinafter provided.

The judgment creditor may require the judgment debtor to furnish his correct social security number by the use of interrogatories. However, use of such interrogatories shall not be a required

condition of a judgment creditor's diligent good faith effort to secure the judgment debtor's social security number. Such remedy shall be in addition to all other lawful remedies available to the judgment creditor.

Except as hereinafter provided, no summons shall be issued pursuant to this section for the garnishment of wages, salaries, commissions or other earnings unless it: (i) is in the form prescribed by §8.01-512.3, (ii) is directed to only one garnishee for the garnishment of only one judgment debtor and (iii) contains both the "TOTAL BALANCE DUE" and the social security number of the judgment debtor in the proper places as provided on the summons. Upon receipt of a summons not in compliance with this provision the garnishee shall file a written answer to that effect and shall have no liability to the judgment creditor, such summons being void upon transmission of the answer.

However, if the judgment which the judgment creditor seeks to enforce (i) does not involve a business, trade or professional credit transaction entered into on or after January 1, 1984, or (ii) is based on any transaction entered into prior to January 1, 1984, then upon a representation by the judgment creditor, or his agent or attorney, that he has made a diligent good faith effort to secure the social security number of the judgment debtor and has been unable to do so, the garnishment shall be issued without the necessity for such number. In such cases, if the judgment debtor's

correct social security number is not shown in the place provided on the summons, and the judgment debtor's name and address as shown on the garnishment summons do not match the name and current address of any employee as shown on the current payroll records of the garnishee, the garnishee shall file a written answer to that effect and shall have no liability to the judgment creditor, such summons being void upon transmission of the answer.

The judgment creditor shall, in the suggestion, specify the amount of interest, if any, that is claimed to be due upon the judgment, calculated to the return day of the summons. He shall also set out such credits as may have been made upon the judgment.

No summons shall be issued pursuant to this section at the suggestion of the judgment creditor or his assignee against the wages of a judgment debtor unless the judgment creditor, or his agent or attorney, shall allege in his suggestion that the judgment for which enforcement is sought either (i) involves a business, trade or professional credit transaction entered into on or after January 1, 1984, or (ii) does not involve a business, trade or professional credit transaction entered into on or after January 1, 1984, and a diligent good faith effort has been made by the judgment creditor, or his agent or attorney, to secure the social security number of the judgment debtor.

In addition, the suggestion shall contain an allegation that:

1. The summons is based upon a judgment upon which a prior summons has been issued but not fully satisfied; or

2. No summons has been issued upon his suggestion against the same judgment debtor within a period of eighteen months, other than under the provisions of subdivision 1; or

3. The summons is based upon a judgment granted against a debtor upon a debt due or made for necessary food, rent or shelter, public utilities including telephone service, drugs, or medical care supplied the debtor by the judgment creditor or to one of his lawful dependents, and that it wa snot for luxuries or nonessentials; or

4. The summons is based upon a judgment for a debt due the judgment creditor to refinance a lawful loan made by an authorized lending institution; or

5. The summons is based upon a judgment on an obligation incurred as an endorser or comaker upon a lawful note; or

6. The summons is based upon a judgment for a debt or debts reaffirmed after bankruptcy.

Any judgment creditor who knowingly gives false information upon any such suggestion or certificate made under this chapter shall be guilty of a Class 1 misdemeanor. (Code 1950, §8-441; 1960, c. 502; 1966, c. 212; 1972, c. 104; 1976, c. 659; 1977, cc. 454, 617; 1978, cc. 321, 506; 1979, cc. 242, 345; 1980, c.

537; 1983, cc. 399, 468; 1984, c. 1; 1985, c. 524; 1991, c. 534.)

§8.01-512.4. Notice of exemptions from garnishment. -- No summons in garnishment shall be issued or served unless a notice of exemptions and claim for exemption form are attached. The notice shall contain the following statement:

NOTICE TO JUDGMENT DEBTOR

HOW TO CLAIM EXEMPTIONS FROM GARNISHMENT

The attached Summons in Garnishment has been issued on request of a creditor who holds a judgment against you. The Summons may cause your property or wages to be held or taken to pay the judgment.

The law provides that certain property and wages cannot be taken in garnishment. Such property is said to be exempted. A Summary of some of the major exemptions is set forth in the request for hearing form. There is no exemption solely because you are having difficulty paying your debts.

If you claim an exemption, you should (i) fill out the claim for exemption form and (ii) deliver or mail the form to the clerk's office of this court. You have a right to a hearing within seven business days from the date you file your claim with the court. If the creditor is asking that your wages be withheld, the method of computing the amount of wages which are exempt from garnishment by law is indicated on the Summons in Garnishment attached. You do not need to file a claim for exemption to receive this exemption, but if you

believe the wrong amount is being withheld you may file a claim for exemption.

On the day of the hearing you should come to court ready to explain why your property is exempted, and you should bring any documents which may help you prove your case. If you do not come to court at the designated time and prove that your property is exempt, you may lose some of your rights.

It may be helpful to you to seek the advice of an attorney in this matter.

REQUEST FOR HEARING -
GARNISHMENT EXEMPTION CLAIM

I claim that the exemption(s) from garnishment which are checked below apply in this case:

MAJOR EXEMPTIONS UNDER
FEDERAL AND STATE LAW

. . . 1. Social Security benefits and Supplemental Security Income (SSI) (42 USC §407).

. . . 2. Veterans' benefits (38 USC §3101).

. . . 3. Federal civil service retirement benefits (5 USC §8346).

. . . 4. Annuities to survivors of federal judges (28 USC §376(n)).

. . . 5. Longshoremens and Harborworkers Compensation Act (33 USC §916).

. . . 6. Black lung benefits.

Exemptions listed under 1 through 6 above may not be applicable in child support and alimony cases (42 USC §659).

. . . 7. Seaman's, master's or

fisherman's wages, except for child support or spousal support and maintenance (46 USC §1109).

. . . 8. Unemployment compensation benefits (§60.2-600, Code of VA).

This exemption may not be applicable in child support cases (§60.2-608, Code of VA).

. . . 9. Portions or amounts of wages subject to garnishment (§34-29, Code of VA).

. . .10. Public assistance payments (§63.1-88, Code of VA).

. . .11. Homestead exemption of $5,000 in cash (§34-4, Code of VA). This exemption may not be available in certain cases, such as payment of rent or services of a laborer or mechanic (§34-5, Code of VA).

. . .12. Property of disabled veterans -- additional $2,000 cash (§34-4.1, Code of VA).

. . .13. Workers' Compensation benefits (§65-2-531, Code of VA).

. . .14. Growing crops (§8.01-489, Code of VA).

. . .15. Benefits from group life insurance policies (§38.2-3339, Code of VA).

. . .16. Proceeds from industrial sick benefits insurance (§38.2-3549, Code of VA).

. . .17. Assignments of certain salary and wages (§55-165, Code of VA).

. . .18. Benefits for victims of crime (§19.2-368.12, Code of VA).

. . .19. Preneed funeral trusts (§54.1-2823, Code of VA).

. . .20. Certain retirement benefits

(§34-34, Code of VA).
. . .21. Other (describe exemption):
$_____.

I request a court hearing to decide the validity of my claim. Notice of the hearing should be given me at:

_____ _____
(address) (telephone no.)

The statements made in this request are true to the best of my knowledge and belief.

_____ _____
(date) (signature of judgement debtor)

(1984, c.1; 1986, c. 489; 1989, c. 684; 1944, c. 40)

§8.01-512.5. Hearing on claim of exemption from garnishment. -- A judgment debtor shall have the right to a hearing on his claim of exemption from garnishment no later than seven business days from the date that the claim is filed with the court.

The clerk shall notify the parties of the date, time and place of the hearing and the exemption being claimed. The garnishee shall comply with the garnishment summons unless and until ordered otherwise in writing by the court. The order shall take effect upon receipt by the garnishee. The clerk is required to provide a copy of the order or other hearing disposition to the garnishee only if the garnishment summons is dismissed or is modified by the judge. (1984, c. 1.)

§34-17. When exemption may be set apart. -- The real or personal estate which a householder is entitled to hold as exempt may be set apart at any time before it is subjected by sale under creditor process, or, if such creditor process does not require sale of the property, before it is turned over to the creditor. To claim an exemption in bankruptcy, a householder who (i) files a voluntary petition in bankruptcy or (ii) against whom an involuntary petition in bankruptcy is filed shall set such real or personal property apart on or before the fifth day after the date initially set for the meeting held pursuant to 11 USC §341, but not thereafter. A householder who converts a case from Chapters 11, 12, or 13 to Chapter 7 shall set such real or personal property apart on or before the fifth day after the date initially set for the meeting held pursuant to 11 USC §341 in the Chapter 7 case, but not thereafter. Nothing in this section shall affect the right of the trustee in bankruptcy, with the approval of the court, to proceed immediately with the sale or other disposition of personal property which the trustee determines to be perishable or particularly susceptible to price deterioration. (Code 1919, §6543; 1944, p. 489; 1974, c. 272; 1981, c. 580; 1985, c. 521; 1990, c. 942.)

§34-34. Certain retirement benefits exempt. -- A. For the purposes of this section:

"Alternate payee" shall have the same meaning as provided under §206 of the Employee Retirement Income Security Act of 1974 (ERISA). In the case of a retirement plan that is not subject to ERISA, the term "alternate payee" means an individual who has an interest in a retirement plan pursuant to a judgment, decree, or order, including approval of a property settlement agreement, that would be described in §206(d)(3)(B) of ERISA if the retirement plan were subject to ERISA.

"Annual benefit" means an amount payable as an annuity for the lifetime of thee individual who claims the exemption provided under this section, assuming that annuity payments will commence upon the individual's attainment of age sixty-five or, if the individual attained age sixty-five on or before the exemption provided under this section is claimed, the individual's age on the date that the exemption is claimed.

"Retirement plan" means a plan, account, or arrangement that is intended to satisfy the requirements of United States Internal Revenue Code §§401, 403(a), 403(b), 408, 409 (as in effect prior to repeal by United States P.L. 98-369), or §457. Whether a plan, account, or arrangement is intended to satisfy the requirements of one of the foregoing provisions shall be determined based on all of the relevant facts and

circumstances including, but not limited to, the issuance of a favorable determination letter by the United States Internal Revenue Service, reports or returns filed with United States or state agencies, and communications from the plan sponsor to participants.

B. The interest of an individual under a retirement plan shall be exempt from creditor process to the extent provided under this section. The exemption provided by this section shall be available whether such individual has an interest in the retirement plan as a participant, beneficiary, contingent annuitant, alternate payee, or otherwise.

C. The exemption provided under subsection B shall not apply to the extent that the interest of the individual in the retirement plan would provide an annual benefit in excess of $17,500. If an individual has an interest in more than one retirement plan, the limitation of this subsection C shall be applied as if all such retirement plans constituted a single plan. The amount required to provide an annual benefit of $17,500 shall be determined under the following table:

Attained Age When Exemption Claimed	Cost of $1 of Annual Benefit
16	0.1482
17	0.1603
18	0.1734
19	0.1875
20	0.2028
21	0.2193

22	0.2371
23	0.2564
24	0.2773
25	0.2998
26	0.3241
27	0.3505
28	0.3789
29	0.4096
30	0.4429
31	0.4789
32	0.5178
33	0.5598
34	0.6054
35	0.6546
36	0.7080
37	0.7658
38	0.8284
39	0.8963
40	0.9699
41	1.0497
42	1.1363
43	1.2304
44	1.3326
45	1.4436
46	1.5645
47	1.6960
48	1.8394
49	1.9958
50	2.1665
51	2.3530
52	2.5571
53	2.7808
54	3.0260
55	3.2954
56	3.5915
57	3.9175
58	4.2771
59	4.6748
60	5.1150
61	5.6035
62	6.1472

63	6.7538
64	7.4330
65	8.1958
66	7.9989
67	7.8007
68	7.6009
69	7.3985
70	7.1924
71	6.9830
72	6.7706
73	6.5556
74	6.3393
75	6.1222
76	5.9054
77	5.6897
78	5.4763
79	5.2638
80	5.0529
81	4.8447
82	4.6403
83	4.4395
84	4.2415
85	4.0456
86	3.8522
87	3.6616
88	3.4742
89	3.2904
90	3.1106
91	2.9354
92	2.7653
93	2.6011
94	2.4415
95	2.2867
96	2.1367
97	1.9935
98	1.8558
99	1.7214
100	1.5972
101	1.4755
102	1.3478
103	1.2690

104	1.1738
105	1.0679
106	0.7517
107	0.0000
108	0.0000
109	0.0000
110	0.0000

For example, the amount required to provide an annual benefit of $17,500 to an individual who attained age 60 at the time the exemption provided by this section is claimed is $89,512.50 ($17,500 times 5.1150).

D. The exemption provided under subsection B shall not apply to amounts contributed to a retirement plan during the fiscal year of the retirement plan that includes the date on which the individual claims the exemption and for the two preceding fiscal years of the retirement plan. The exemption provided under subsection B shall not apply to the earnings on contributions described in this subsection.

E. The exemption provided under subsection B shall not apply to claims made against an individual by the alternate payee of such individual or to claims made against such individual by the Commonwealth in administrative actions pursuant to Chapter 13 (§63.1-249 et seq.) of Title 63.1 or any court process to enforce a child or child and spousal support obligation.

F. If two individuals who are married or were married are entitled to claim the exemption provided under

subsection B of an interest under the same retirement plan or plans and such individuals are jointly subject to creditor process as to the same debt or obligation and the debt or obligation arose during the marriage, then the exemption provided under subsection B as to such debts or obligations shall not exceed, in the aggregate, the amount that would provide an annual benefit of $17,500. The maximum amount that may be exempted shall be allocated among such persons in the same proportion as their respective interests in the retirement plan or plans.

G. The exemption provided under this section must be claimed within the time limits prescribed by §34-17. (1990, c. 425; 1992, c. 716.)

§8.01-505. When lien acquired on intangibles under §8.01-501 ceases. -- The lien acquired under §8.01-501 on intangibles shall cease whenever the right of the judgment creditor to enforce the judgment by execution or by action, or to extend the right by motion, ceases or is suspended by a forthcoming bond being given and forfeited or by other legal process. Furthermore, as to all such intangibles the lien shall cease upon the expiration of the following periods whichever is the longer: (i) one year from the return day of the execution pursuant to which the lien arose, or (ii) if the intangible is a debt due from, or a claim upon, a third person in favor of the judgment debtor or the estate of such third person, one year from the final determination of the amount owed to the judgment debtor. (Code 1950, §8-434; 1977, c. 617.)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VA
ROANOKE DIVISION

NCNB FINANCIAL SERVICES, INC
Plaintiff

C.A. #86-0433-R

v.

C.A. #83-0279-R

JOSEPH B. SHUMATE, JR.
Defendant

NCNB FINANCIAL SERVICES, INC.
Plaintiff

v. C.A. #86-0432-R

COLEMAN FURNITURE CORP.
Defendant

ROY V. CREASY, TRUSTEE
Plaintiff

v. C.A. #86-0272-R

COLEMAN FURNITURE CORP. PENSION PLAN
Defendant.

REQUEST FOR HEARING FOR EXEMPTIONS
FROM WRIT OF EXECUTION LEVY AND LIEN

Comes now Joseph B. Shumate, Jr. and files his exemptions to the writ of execution filed against him by NationsBank on April 21, 1993, levy filed on Premier Bank of Wytheville, Virginia against funds held by them for Shumate dated June ___, 1993, and notice of lien

served on Shumate dated June 17, 1993.

1. Homestead deed on his undivided interest in 7.03 acres of land located in Pulaski County, Virginia, pursuant to Virginia Code §34-1.

2. All exemptions allowed pursuant to Virginia Code §34-26.

3. All monies in a spendthrift trust and disbursements coming to Shumate for his maintenance and support pursuant to Virginia Code §55-19 the trust being established prior to July 1, 1990.

4. All pension income in the amount of $17,500 per annum pursuant to Virginia Code §34-34.

5. Social security benefits in the amount of $9,600 per annum pursuant to 42 USC §407.

WHEREFORE, the petitioner requests a hearing for a court order to exempt the above described assets pursuant to Virginia Code §8.01-546.2 the execution being directed to the U.S. Marshall for the U.S. District Court for the Western District of Virginia.

Respectfully submitted,

/s/ Joseph B. Shumate, Jr.
Joseph B. Shumate, Jr.
P.O. Box 2092
Pulaski, VA 24301-1920
(703) 980-5030

CERTIFICATE OF MAILING

I certify that a true copy of the foregoing has been mailed to J. F. Douthat, P.O. Box 14125, Roanoke, VA 24038-4125, counsel for NationsBank, this 18th day of June, 1993.

/s/ Joseph B. Shumate, Jr.
Joseph B. Shumate, Jr.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VA
ABINGDON DIVISION

NCNB FINANCIAL SERVICES, INC.
Plaintiff

-vs-

JOSEPH B. SHUMATE, JR.
Defendant

CA NO. 93-2092
NOS. 83-0279-R, 86-0433-R, 86-0432-R, and 86-0272-R

JUNE 25, 1993

HEARD BEFORE:

THE HONORABLE GLEN M. WILLIAMS

ON-THE-RECORD REPORTING
(703) 676-2378

Marshall, that's who it was addressed to, until June 19, 1993.

A lien is not valid on any funds prior to the Notice of Lien or execution. And these funds, which I took and paid people who had provided me my maintenance and support --

THE COURT: Well, there is nothing before me seeking to get this money. The only thing I have before me is a Motion to Quash at this bank. That's what I set this hearing for, and that's all that I'm interested in going into.

MR. SHUMATE: All right. I also have a Motion for Exemption.

THE COURT: As to money that's been spent, it's spent. It's not tied up, and I don't have anything before me.

MR. SHUMATE: I also ask that the Court release the savings account that has $500.00 in it which is for collateral for an appeal cost bond to the Court of Appeals of Virginia. I also request permission to withdraw this one and copy it.

THE COURT: All right.

MR. SHUMATE: This Notice of Lien, which the execution was issued to the U.S. Marshall, is on another savings account which is the Highlands Uptown Club in care

it in the Record.

A I do not have it with me.

Q You didn't bring it down here?

A No, I did not.

Q Is that one of the things I asked you to bring? Did I ask you to bring all the records about the disbursement of these funds?

A I don't recall. Do you have your letter?

Q You don't recall my asking you to do that?

A What does your letter say?

Q Do you recall agreeing to bring any documents down here today?

A You wrote me a letter. What does your letter state?

Q Well, Mr. Shumate, we had an agreement for you to bring some documents so the Court could have a complete record of these events, did we not?

A I do not recall that. As I said, you did write me a letter, but I did not bring the letter. You also filed a Motion to Compel. I did get that. And I did get a letter from you, but I don't recall what you asked for.

MR. HODGES: You Honor, I'm going to ask that this Record be supplemented with some of these documents. We've avowed to the Court, we've asked Mr. Shumate --

THE COURT: Well, the only issue I have before me

is in regard to the money that is tied up that's in this bank. Now, there has got to be some kind of procedure or process, and you're going into discovery as to what happened to this other money.

I mean, you filed nothing in front of me about getting this money, other than -- the only thing I have before me is a Motion to Quash this Notice of Lien to this bank. As to the rest of these funds, I've got nothing in front of me. So you're discovering him on something that really is not in front of me.

MR. HODGES: I'm discovering him on something that's in his own affidavit, Your Honor, that the Court has accepted. What is happening as far as the factual record goes here, he's being able to filter the conclusive facts and put them before the Court.

All I can say, Your Honor, is we would like the opportunity to get these other documents before the Court and I'll move on.

THE COURT: I don't see why you can't just -- this was put in your money, Mr. Shumate, and these checks were written, and they've been cashed. I don't see why you can't get the checks and bring them in here, the canceled checks, and have it over with. I mean, there is no need of hiding all this stuff.

MR. SHUMATE: Your Honor, they were bank checks,

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VA
ROANOKE DIVISION

NCNB CORPORATION AND
SUBSIDIARIES, now known as
NationsBank,
Plaintiff

v. C.A. #83-0279-R
and #86-0433-R

JOSEPH B. SHUMATE, JR.,
Defendant.

PETITION FOR EXEMPTION
FROM GARNISHMENT SUMMONS

Comes now the defendant Joseph B. Shumate, Jr. and moves for the district court to exempt the funds held by the garnishee, Premier Bank, in account $54162-3, a trust account for future pension benefits of Joseph B. Shumate, Jr., for the following reasons:

1. The defendant moved to quash NCNB's lien and garnishment proceeding of June 15, 1993, on June 21, 1993 on the grounds that the funds were still protected by ERISA. Shumate also filed for exemption pursuant to Virginia garnishment proceedings on June 21, 1993.

2. On June 30, 1993 the district court denied Shumate's motion to quash NCNB's motion for garnishment on the grounds that ERISA no longer protected the funds. The court denied Shumate's petition to alter or amend but stayed its order pending appeal to the U.S. Court of

Appeals for the 4th Circuit and did not rule on the defendant's motion for exemptions filed on June 21, 1993 pending appeal.

3. The 4th Circuit affirmed the district court's ruling on December 29, 1994, petition for rehearing denied on February 6, 1995. The return date of the garnishment execution was May 19, 1994.

4. Federal Rules of Civil Procedure 69 governs the process to enforce a judgment for the payment of money. The procedure on execution shall be in accordance with the practice and procedure of the state in which the district court is held, existing at the time the remedy is sought except that any statute of the U.S. governs to the extent that it is applicable. There is no governing applicable federal statute. Thus, in this action Virginia is the forum state.

5. Virginia Code §8.01-511 et. seq. lays out the procedure for garnishment in Virginia. Section 8.01-512.4 provides for the notice of exemption from garnishment and spells out major exemptions under federal and state law. Major exemption form #20 exempts certain retirement benefits pursuant to §34-34 Code of Virginia. Section 8.01-512.5 states that a judgment debtor shall have the right to a hearing on his claim of exemption from garnishment no later than seven business days from the date the exemption is filed with the court.

6. Virginia Code §34-34 exempts pensions from garnishment process.

Shumate placed the funds received from the district court's registry earmarked for future pension payments in account #54162-3 in Premier Bank in Pulaski, Virginia to be rolled over or placed in an insured annuity one business banking day after he received them being June 14, 1993. Shumate did not have constructive possession of those funds as he did not cash the check. He placed those funds into a trust account for his future pension benefit payments as he had elected to take his benefits on a life only monthly payments. Shumate did not co-mingle these funds with other funds. They were placed in a new trust account for this purpose.

7. Under §34-34A such an exempt retirement plan means a plan, account or arrangement that is intended to satisfy the requirements of 26 USC §§401, 403(a), 403(b), 408 and 409.

Shumate's pension funds came from the Coleman Furniture single employer defined pension benefit plan and trust and met all conditions in 26 USC §401 et. seq. pertaining to such a plan and trust.

In order to satisfy 26 USC §403(a)(4)(B) Shumate must be allowed to roll over or place this funds into an annuity within 60 days of receipt pursuant to §402(a)(5)(C) pursuant to §34-34.

Section 34-34B holds that the interest of an individual under a retirement plan shall be exempt from creditor process to the extent provided

under this section.

Section 34-34(C) provides an exemption in a retirement plan up to $17,500 per year and provides a table to determine the amount of funds required to fund an annual benefit based on the individuals age when the exemption is claimed. When Shumate filed for his exemption in 1993 he was 64 years of age and allows him to exempt up to $130,007.5 to fund his future pension benefits.

Section 34-34D is not applicable as no funds have been contributed to the retirement plan for over 20 years.

Section E is not applicable as there is no alternative payee nor are there any claims against Shumate by the Commonwealth under Virginia Code §63.1-251.

Section F is not applicable as Shumate is not married.

Section G refers to Virginia Code §34-17 which states that real or personal estate may be exempted at any time before the property is sold under creditor process or before it is turned over to the creditor. Shumate's exemption has been claimed before turnover.

The bankruptcy clause is not applicable as 11 USC §541(c)(2) excludes a retirement plan that satisfies 26 USC §§401, 403(a), 403(b) from the bankruptcy estate. See Patterson v. Shumate, 112 S.Ct. 2242 (1992).

8. Since this court and the 4th Circuit has held in this action that Shumate's pension funds are no longer protected by ERISA, 29 USC §1144 no longer supersedes any and all state laws pertaining to the funds Shumate has in a trust fund in Premier Bank.

Virginia Code §34-34 does not single out ERISA plans. Section 34-34 refers to plans that meet 26 USC §§401, 403(a) and 403(b), not ERISA. The Supreme Court in Mackey v. Lanier Collections Agency, 486 U.S. 825, 838 (1988) at note 12 states that state law garnishment procedures are not preempted by ERISA. The court concluded that any state law which singles out ERISA plans by express reference for special treatment is preempted, stating it is this singling out that preempts a state anti-garnishment exemption.

A neutral state law of general application with a tangential impact on a plan does not relate to ERISA and is not preempted. See Shaw v. Delta Airlines, 463 U.S. 100 (1983) n. 21.

A state law that relates to ERISA must also purport to regulate it. Retirement Fund Trust of Plumbing v. Franchise Tax, 909 f.2d 1266 (9 CCA 1990). Virginia Code §34-34 does not relate to ERISA or purport to regulate ERISA plans.

WHEREFORE, based on the above the defendant, Joseph B. Shumate, Jr., moves that the district court dismiss the garnishment summons with prejudice and

enjoin NationsBank from taking any action to attach, collect, freeze or garnishee these funds while protected by Virginia Code §34-34, and what other relief the court may deem appropriate and also granting defendant his costs.

Respectfully submitted,

/s/ Joseph B. Shumate, Jr.
Joseph B. Shumate, Jr.
P.O. Box 2092
Pulaski, VA 24301-1920
(703) 980-5030
FAX: (703) 674-4710

CERTIFICATE OF MAILING

I certify that a copy of the above petition was mailed to Steven M. Hodges, PENN, STUART, ESKRIDGE & JONES, P.O. Box 2288, Abingdon, VA 24210, counsel for NationsBank, this 20th day of April, 1995.

/s/ Joseph B. Shumate, Jr.
Joseph B. Shumate, Jr.

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NCNB FINANCIAL SERVICES,
INC., (now NationsBank),
Plaintiff-Appellant

v. No. 92-2474

JOSEPH B. SHUMATE, JR.;
JOHN R. PATTERSON, TRUSTEE;
COLEMAN FURNITURE CORP.;
ROY V. CREASY, TRUSTEE;
COLEMAN FURNITURE CORP.
PENSION PLAN,
Defendants-Appellees.

Appeal from the United States
District Court for the Western District
of Virginia, at Roanoke,
Glen M. Williams,
Senior District Judge.
(CA-83-279-R, CA-86-433-R,
CA-86-432-R, CA-86-272-R)

Submitted: February 18, 1993

Decided: May 18, 1993

Before MURNAGHAN and NIEMEYER, Circuit Judges, and SPROUSE, Senior Circuit Judge

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Affirmed by unpublished per curiam opinion.

COUNSEL

Stephen McQuiston Hodges, PENN, STUART,

ESKRIDGE & JONES, Abingdon, Virginia, for Appellant. Joseph B. Shumate, Jr., Pulaski, Virginia; John R. Patterson, Roanoke, Virginia; William M. Mercer-Meidinger, Richmond, Virginia; Roy V. Creasy, VOGEL & CROMWELL, Roanoke, Virginia, for Appellees.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

OPINION

PER CURIAM:

NCNB Financial Services, Inc. (NCNB) appeals the district court's order denying its motion for payment of funds held in the court registry and the order denying its motion to alter or amend judgment under Fed. R. Civ. P. 59. The issue is whether Joseph Shumate's pension fund benefit, which has been held in the district court's registry since 1987, is still entitled to protection under the Employee Retirement Income Security Act of 1974 (ERISA), 29 USCA §§1001-1461 (West 1985 and Supp. 1992), or whether it is subject to garnishment by NCNB in satisfaction of is judgment against Shumate.

Shumate was president of Coleman Furniture Company and was a participant in Coleman's pension plan. It is undisputed that this plan was a "qualified plan" under ERISA. See

Patterson v. Shumate, 60 U.S.L.W. 4550, 4552 (U.S. 1992); 29 USCA §1056(d)(1) (West Supp. 1992). Coleman filed for reorganization under Chapter 11 of the Bankruptcy Code in 1982; Shumate's personal bankruptcy followed two years later. A dispute then arose among Shumate, the trustee of Shumate's bankruptcy estate (the "Shumate trustee") over Shumate's interest in the Coleman pension plan. Shumate settled the dispute with the Coleman trustee for $250,000 and agreed to payment of this amount into the district court's registry, pursuant to Fed. R. Civ. P. 67, pending the outcome of the dispute between Shumate and the Shumate trustee.

The dispute between Shumate and the Shumate trustee, over the inclusion of Shumate's pension benefit in his bankruptcy estate, was ultimately settled by the United States Supreme Court. Patterson v. Shumate, 60 U.S.L.W. 4550 (U.S. 1992). The Supreme Court upheld this Court's decision that Shumate's interest in the Coleman pension fund was not includible in his bankruptcy estate. See Shumate v. Patterson, 943 F.2d 362 (4th Cir. 1991).

While the pension matter was pending, NCNB obtained a judgment against Shumate as guarantor on a note to Coleman and also on a personal promissory note. This Court affirmed the district court's award to NCNB, but remanded for recalculation of interest and attorneys' fees. NCNB Fin. Servs. v. Shumate, No. 90-2026 (4th Cir. Jan. 15, 1992) (unpublished). The revised judgment, as

of March 1992, totalled $410,000.

The present appeal stems from NCNB's attempt to partially satisfy its judgment by levying on Shumate's pension fund, which is still being held in the district court. The district court determined that (1) the fund was absolutely protected by ERISA while in the hands of the district court, and (2) that is status once paid to Shumate was not ripe for decision because he had not yet received the funds. NCNB appeals.

First, the district court was correct in determining that Shumate's pension fund was absolutely protected by ERISA while in the district court's registry. NCNB admits that "statutes and regulation proscribe garnishment of employee benefits held in a qualified plan." (Appellant's informal brief, p. 9). See Tenneco v. First Virginia Bank, 698 F.2d 688, 689-90 (4th Cir. 1983) ("[A]n employee's accrued benefits under such a qualified plan may not be reached by judicial process in aid of a third-party creditor," even if the benefits are fully vested and may be withdrawn at the employee's request). NCNB argues that this protection no longer applies, however, because the funds are not being held in an ERISA qualified plan, but rather in the district court's registry. It is NCNB's position that the benefits were "distributed" to Shumate when the Coleman trustee paid the funds into the district court's registry. The district court disagreed, finding that "[w]hat is dispositive, according to cases interpreting ERISA, is whether the

assignment of the benefits occurred after an actual, and not constructive, distribution was made to the employee." See Tenneco, 698 F.2d at 690; see also Smith v. Mirman, 749 F.2d 181 (4th Cir. 1984). We find no support for NCNB's position. Therefore, we agree with the district court's conclusion.

Second, the district court correctly determined that the fate of the funds once in Shumate's hands was not ripe for decision as no payout has yet occurred. Shumate has a sixty-day rollover period in which to invest the pension funds in another qualified plan. 26 USC §402(a)(5). Because it is impossible to know yet whether Shumate will take advantage of this provision, the district court was unable to rule on the bank's ability to garnish the funds once they were turned over to Shumate. Therefore, we affirm both orders of the district court appealed by NCNB. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the Court and argument would not aid the decisional process.

AFFIRMED

§1056. Form and Payment of Benefits

(d) Assignment or alienation of plan benefits. (1) Each pension plan shall provide that benefits provided under the plan may not be assigned or alienated.

Joseph B. Shumate, Jr., temporary trustee for the pension funds belonging to him deposited in Premier Bank's savings account #54162-3 during the rollover period from the Coleman Furniture E.R.I.S.A. approved plan to another approved plan pursuant to 26 U.S.C. §402.

/s/ Joseph B. Shumate, Jr.
JOSEPH B. SHUMATE, JR.

Accepted: /s/ J. Gray

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
October 16, 1995

No. 95-2048
CA-83-279-R
CA-86-272-R
CA-86-433-R
CA-86-432-R

NCNB FINANCIAL SERVICES, INC.
Plaintiff-Appellee

and

ROY V. CREASY, Trustee
Plaintiff

v.

JOSEPH B. SHUMATE, JR.
Defendant-Appellant

and

COLEMAN FURNITURE CORP. PENSION PLAN; JOHN R. PATTERSON, Trustee
Defendants

No. 95-2824
CA-86-272-R

JOSEPH B. SHUMATE, JR.
Appellant

In Re:

ROY V. CREASY, Trustee
Plaintiff

v.

COLEMAN FURNITURE CORP. PENSION PLAN; JOHN R. PATTERSON, Trustee
Defendants

O R D E R

The Court consolidates the above cases for further appellate action.

For the Court - By Direction

/s/ Bert M. Montague
Clerk